from epilepsy as a result of the injuries received in the accident.

Claim dismissed.

Solicitors: *Murphy & Dunbar; R.K. Nathan & Co.*

THE "YIH SHEN"

LAI LAI YIN v. M.V. "YIH SHEN", OWNERS OF AND OTHER PERSONS INTERESTED

[O.C.J. (Mohamed Dzaiddin J.) May 28 & June 12, 1985]

[Penang – Admiralty in Rem No. 1 of 1984]

Practice & Procedure – Order for sale of vessel – Execution – Application to stay – Court's unfettered discretion to grant or refuse stay – Whether special circumstances exist to grant stay.

Shipping Law – Order for sale of vessel – Execution – Application to stay – Whether sale prior to hearing will prove nugatory – Meaning of "nugatory" – Court's unfettered discretion to grant or refuse stay – Whether special circumstances exist to grant stay.

This was an application for a stay of execution of an order given on April 15, 1985 for the vessel "YIH SHEN" to be appraised and sold *pendente lite*. The grounds of the application as stated in the summons were (1) the defendants intended to appeal against the April 15 Order, (2) unless restrained, the vessel if sold prior to the appeal will render the appeal, if successful, nugatory.

Held: (1) this was a case where the court had an absolute and unfettered discretion to grant or refuse a stay. It was incumbent upon the defendants to show from the affidavit the special circumstances to enable the court to grant a stay of execution;

(2) there was no basis for the allegation that should the appeal against the order be successful, the result would be nugatory if the stay was refused because upon the sale being successful the proceeds thereof would not in this case be paid to the plaintiff but would be deposited into court pending the final disposal of the civil action;

(3) the fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay;

(4) in the premises the defendants had not shown any special circumstances to enable the judge to exercise his discretion to grant the application.

Cases referred to:

(1) *Wilson* v. *Church (No. 2)* (1879) 12 Ch. D. 454.

(2) *Orion Property Trust Ltd.* v. *Du Cane Court Ltd.* [1962] 1 W.L.R. 1085.

(3) *Re. Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 131 F.C.

(4) *Atkins* v. *Great Western Railway Co.* 2 T.L.R. 400.

HIGH COURT.

Yeoh Jin Aik for the plaintiffs.

R. J. Manecksha for the defendants/applicants.

Darshan Singh (watching brief) for the five plaintiffs in A.R. 5/85 who are interested parties.

Cur. Adv. Vult.

Mohamed Dzaiddin J. : This is an application for a stay of execution of the Order made by me given on April 15, 1985 when I ordered the vessel "YIH SHEN" to be appraised and sold *pendente lite* by the Sheriff of the High Court Penang.

The grounds of this application as stated in the summons are that: The defendants being dissatisfied with my Order intend to appeal against my decision (which they have now appealed *vide* Supreme Court Appeal No. 173/85) and the more important ground is that unless restrained the vessel if sold prior to the hearing of the appeal which, if successful, will prove nugatory. The dictionary meaning of the word "nugatory" in the circumstances is "of little value".

The application was supported by the affidavit of Chan Kam Kheong, the authorised agent in Penang of the defendants, affirmed on April 25, 1985 (Encl. 64). He deposed that the defendants have a reasonable chance of success in the appeal and unless the present status is preserved the appeal will be nugatory should the defendants succeed. In addition, he stated that pending hearing of the appeal he was prepared to meet all the necessary expenses of maintaining the ship and its crew.

On behalf of the defendants, Mr. R.J. Manecksha further submitted that the merit of the plaintiffs claim has yet to be determined at a trial proper.

Mr. Yeoh for the plaintiff opposed this application.

This is a case where the Court has an absolute and unfettered discretion to grant or refuse the stay. *Halsbury's* Law of England 4th Edition, Vol. 17, para. 455 states as follows:

"The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing."

Thus, it is incumbent upon the defendant in this case to show from the affidavit the special circumstances to enable this court to grant a stay of execution. Examples of "special circumstances" are many and are enumerated at the footnote of *Halsbury's* Laws *(supra).* However, the leading authority relied upon by the defendant is *Wilson* v. *Church (No. 2)*[1] where Cotton L.J. laid down the principle at p. 458 "... when a party is appealing, exercising his undoubted right to appeal, this Court ought to see that the appeal, if successful, is not nugatory." This principle was applied in *Orion Property Trust Ltd.* v. *Du Cane Court Ltd.*;[2] and in the local case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[3]

From the affidavit of Mr. Chan and the submission of counsel I cannot find anything which would amount to being nugatory in the event the appeal (Supreme Court Civil Appeal No. 173 of 1985) being successful.

My reasons for granting an order for appraisement and sale of the vessel *pendente lite* are quite clear. They are essentially to prevent the vessel from deteriorating which would considerably reduce the price if it was allowed to be floating in the waters of Penang harbour pending the hearing of the main suit. At the same time the cost of maintenance including wages of the crew would increase day by day. Again, upon the sale being successful the proceeds thereof could not in this case be paid to the plaintiff but would be deposited into court pending the final disposal of the civil action. In such circumstances the question asked is: Where on earth is the basis of the allegation that should the appeal against April 15 Order be successful, the result would be nugatory if the stay is refused.

I should also add that the fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay. See: *Atkins* v. *Great Western Railway Co.*,[4] where the English Court of Appeal held that strong grounds of appeal are not sufficient to grant the application.

In the premises, I find that the defendants have not shown any special circumstances to enable me to exercise my discretion to grant this application.

For these reasons, I dismiss the defendants' application with costs.

Application dismissed.

Solicitors: *Shearn Delamore & Co.; Lim Kean Siew & Co.; Darshan Singh & Co.*

PUBLIC PROSECUTOR v. YAP SIN PENG

[A.C.J. (Chan J.) November 27, 1985]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 147 of 1985]

Criminal Law and Procedure – Sentence – Charge of acting as bookmaker – Public interest – Betting Ordinance, 1953 s. 6(3) (a).

Gaming – Bookmaker – Sentence enhanced – Public interest.

In this case the respondent had pleaded guilty to the offence of acting as a bookmaker under section 6(3) (a) of the Betting Ordinance, 1953. He was sentenced to a fine of $2,000. The Public Prosecutor appealed against the inadequacy of the sentence. According to the expert the total number of bets accepted and placed on horse racing according to the records was $20,808.

Held: it is in the interest of the public that the unrealistic kind of sentence which was imposed in this case should not be upheld. The sentence should be enhanced by adding a prison term of 18 months and increasing the fine to $20,000 in default six months' imprisonment.

Cases referred to:

(1) *Cheong Ah Cheow* v. *Public Prosecutor* [1985] 2 M.L.J. 257, 259.
(2) *R.* v. *Davies* (1978) 67 Cr. App. R. 207, 210.

CRIMINAL APPEAL.

Tan Hock Chuan (Deputy Public Prosecutor) for the Public Prosecutor.

Respondent in person.

Cur. Adv. Vult.

Chan J. : On April 15, 1985, at the Magistrate Court (Cik Salmah Kasim) at Jalan Duta, Kuala Lumpur, the respondent Yap Sin Peng, after pleading guilty to the offence of acting as a bookmaker